Supreme Court of the United States.

No. 21.

LOUIS WALSH AND BENJAMIN CARVER,
RESPONDENTS,

vs.

THE STEAMSHIP CHINA, HER TACKLE, &c., THE BRITISH AND NORTH AMERICAN ROYAL MAIL STEAM PACKET COMPANY, CLAIMANTS, APPELLANTS.

BRIEF FOR RESPONDENTS.

STATEMENT.

The respondents, as owners of the brig Kentucky, filed their libel in the district court of the southern district of New York, against the steamship China, one of the Cunard packets, alleging that on the 15th of July, 1863, the day being clear and the brig Kentucky being on a voyage from Cardenas to New York, with a cargo of sugars on freight, and "while a short distance outside of Sandy Hook, and sailing by the wind on a course nearly north, at a rate not exceeding two miles an hour, the said steamship China, which was leaving the port of New York, and steering nearly due east under a head of steam which propelled her at the rate of more than six miles an hour, negligently collided with and ran into the said brig Kentucky, and stove in her side in such a manner as to cause her speedily to sink, and thereby caused the loss of the vessel and the destruction of her cargo."

Record, fols. 1, 2.

The British and North American Royal Mail Steam Packet Company intervened as claimants of the China, and in their answer admit the collision, but deny "that said collision was in consequence of any negligence of the officers or crew of the said steamer."

Fol. 20.

The answer further alleges, "that at the time of said collision, the said steamer China was in charge of a pilot duly licensed by virtue of certain acts of the Legislature of the State of New York; that said pilot was taken in conformity with the requirements of the laws of the State of New York; that the said pilot directed all the manœuvres of the steamer which preceded that collision, and the respondents claim and insist that, by reason hereof, they are not responsible for any loss or damage caused thereby."

Fol. 21.

The libel was amended by adding other part-owners as libellants, and again by enlarging the allegation of the form and extent of the libellants' damages.

Fols. 25–31, 143–145.

The proofs fully sustained the allegation of the libel, that the steamer China was in fault in the collision, and the brig Kentucky was wholly free from blame.

The allegation of the answer, that the collision occurred while the steamer China was in charge of a pilot licensed under the laws of New York, and that he directed the manœuvres which preceded the collision, was also proved.

The principal evidence bearing upon both questions is found at

Fols. 40–42, 50–53, 60–61, 63–65, 80–82, 87–88.

A decree was made by his Honor Judge BETTS for the libellants, and a reference to a commissioner ordered to compute their damages.

Fol. 91.

The commissioner reparted the damages at $19,898 34, and, upon exceptions, his report was confirmed, and a decree entered for the amount.

Fols. 135–137, 147–148.

Upon an appeal by the claimants to the circuit court, and a hearing before his Honor Judge NELSON, this decree was affirmed.

Fol. 159.

POINTS.

FIRST POINT.—Upon the proofs, it is manifest that the brig Kentucky, in her navigation and management, did not contribute at all to, or towards, the collision, and was wholly free from blame.

It is equally manifest that to the faults, error, and negligence in the navigation and management of the steamship China, the collision was wholly attributable.

Upon this state of the proofs, the libellants were entitled to a decree *in rem* against the China, as the responsible and blameworthy cause of the destruction of the Kentucky, and to full indemnity for their loss and damage.

To this effect the decree was made by the district court, and affirmed by the circuit court.

SECOND POINT.—The only defence on behalf of the China is, that she was at the time in charge of a pilot, duly licensed under the laws of the State of New York, and that he directed the manœuvres of the China which preceded the collision.

This fact, however satisfactorily proved, is no defence to the steamship China, and leaves her still the responsible and blameworthy cause of the collision.

I. The theory of the specific responsibility of the offending vessel to make good the injury which her improper navigation has inflicted upon an innocent sufferer, proceeds upon reasons, both of justice and of policy, which exclude the protection against such responsibility here asserted.

This theory treats the faults of conduct in the vessel's navigation, which the law regards as blameworthy, as imputable to the VESSEL ITSELF, and discards, as immaterial, all considerations touching the *adjustment* among the navigators, or between them and the owners, of the personal fault or personal responsibility of the misgovernment of the vessel.

It also gives to the sufferer the security of redress which the vessel itself, in its value and its subjection to judicial recourse, furnishes, as contrasted with the contingencies of personal sufficiency, or personal accessibility, of the individuals in fault.

II. Accordingly, in practical execution of this theory, the very blow which inflicts the culpable injury upon the innocent vessel impresses in her favor a *lien* of indemnity upon the offending vessel. The proceeding *in rem* of the admiralty is but a judicial consummation of this lien, and requires for its support nothing but proof of such fault of the vessel as, by the rules of maritime law, raises the lien.

III. To displace this lien, and defeat this recourse *in rem*, and thus reduce the sufferer to recourse against the individual in fault, is, in effect, to supplant the admiralty jurisprudence and the admiralty procedure, and overthrow the reasons of justice and policy upon which they are built up.

Such consequences can be assigned only to legislation of paramount authority over the jurisprudence and the jurisdiction.

THIRD POINT. The collision between the *Kentucky*, a seagoing vessel of the United States, and the *China*, a foreign steamer, having occurred upon the high seas, the municipal legislation of the State of New York is inadequate to the authority imputed to it, in derogation of the admiralty jurisdiction or the principles of its administration.

In the absence, then, of federal legislation in the premises, the established rules of maritime law, as daily enforced in the admiralty courts of the United States, must prevail.

It is intolerable that the foreign commerce of the United

States should be withdrawn by State legislation from the protection of the admiralty jurisdiction conferred upon the federal judiciary, in plenary and exclusive terms, by the Constitution.

This would open the uniformity and equality of the ports of the country, as resorts of foreign commerce, intended by the Constitution, to invasion by the competing regulations of the States.

FOURTH POINT. But the pilotage regulations, found in the legislation of the State of New York, do not assume to contravene or modify the recourse, in the admiralty, by which, through the proceeding *in rem*, the offending vessel makes good to the innocent sufferer the injury it has inflicted.

The material provision of the New York statute is as follows:

§ 29. * * * * All masters of foreign vessels and vessels from a foreign port, and all vessels sailing under register, bound to or from the port of New York by the way of Sandy Hook, shall take a licensed pilot; or in case of refusal to take such pilot, shall himself, owners, or consignees, pay the said pilotage, as if one had been employed; and such pilotage shall be paid to the pilot first speaking or offering his services as pilot to such vessel.

Any person not holding a license as pilot under this act or under the laws of the State of New Jersey, who shall pilot or offer to pilot any ship or vessel to or from the port of New York by the way of Sandy Hook, except such as are exempt by virtue of this act; or any master or person on board a steam-tug or tow-boat who shall tow such vessel or vessels without such licensed pilot on board such vessel or vessels, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by a fine not exceeding one hundred dollars or imprisonment not exceeding sixty days; and all persons employing a person to act as pilot, not holding a license under this act, or under the laws of the State of New Jersey, shall forfeit and pay to the board of commissioners of pilots the sum of one hundred dollars.

§ 2. The provisions of this act shall not apply to vessels

propelled wholly or in part by steam, owned or belonging to citizens of the United States, and licensed and engaged in the coasting-trade.

Laws of New York, 1857, vol. 1, ch. 243, p. 500.

It is apparent that the whole force and weight of these provisions of the statute is simply in support of the *emoluments* of the pilot service, provided by the State, in aid of the commerce of its ports.

The State has undertaken to impose a duty upon all vessels embraced within its provisions, "bound to or from the port of New York by way of Sandy Hook," of paying *pilotage*, whether they employ a pilot or not, and to superadd a payment to the pilot commissioners of $100 in case of the employment of a pilot not licensed within the permission of the act.

No penal consequences whatever are visited upon the vessel or its owners from an omission to employ one of the pilots provided by the act, and a contribution of the vessel to the pilot service, provided by the act, of the pilotage-fees, discharges every obligation, moral and legal, imposed by the terms or policy of this legislation.

To import, from this limited policy and narrow expression, into the legislation of the State of New York, the purpose and effect of liberating all vessels in charge of these pilots from responsibility for injuries inflicted by culpable navigation, and to oust the admiralty jurisdiction and jurisprudence of the United States in the premises, is extravagant and preposterous.

See Atty. Gen'l *vs.* Case. 3 Price, (Exch.,) 302.

FIFTH POINT. The British statutes, to which, as a paramount authority, the British court of admiralty has accorded the consequence of protecting from all responsibility for culpable injuries inflicted during navigation by and obedient to the direction of pilots in charge, have made determinate and preemptory provisions, both of compulsion upon the vessel to employ the pilot and of exemption from responsibility while directed by him.

Thus the statute of 6 George, IV, ch. 125, provides as follows:

"§ 55. *And be it further enacted*, That no owner or master of any ship or vessel shall be answerable for any loss or damage which shall happen to any person or persons whomsoever, from or by reason or means of any neglect, default, imcompetency, or incapacity of any licensed pilot acting in the charge of any such ship or vessel, under or in pursuance of any of the provisions of this act, where and so long as such pilot shall be duly qualified to have the charge of such ship or vessel, or where and so long as no duly-qualified pilot shall have offered to take charge thereof."

"§ 58. *And be it further enacted*, That every master of any ship or vessel who shall act himself as a pilot, or who shall employ or continue employed as a pilot any unlicensed person, or any licensed person acting out of the limits for which he is qualified, or beyond the extent of his qualification, after any party licensed and qualified to act as such, within the limits in which such ship or vessel shall then actually be, shall have offered to take charge of such ship or vessel, or have made a signal for that purpose, shall forfeit for every such offence double the amount of the sum which would have been legally demandable for the pilotage of such ship or vessel, and shall likewise forfeit for every such offence an additional penalty of five pounds for every fifty tons burthen of such ship or vessel."

2 Pritch, Adm. Dig. App., p., 13.

The British merchant shipping act, (17 and 18 Victoria, ch. 104,) contains the equivalent provisions:

"§ 353. Subject to any alteration to be made by any pilotage authority, in pursuance of the power hereinbefore in that behalf given, the employment of pilots shall continue to be compulsory in all districts in which the same was by law compulsory immediately before the time when this act comes into operation; and all exemptions from compulsory pilotage then existing within such districts shall also continue in force; and every master of any unexempted ship, navigating within any such district, who, after a qualified pilot has offered to take charge of such ship, or has made a signal for that purpose,

either himself pilots such ship, without possessing a pilotage certificate enabling him so to do, or employs or continues to employ an unqualified person to pilot her, and every master of any exempted ship navigating within any such district who, after a qualified pilot has offered to take charge of such ship, or has made a signal for that purpose, employs or continues to employ an unqualified pilot to pilot her, shall, for every such offence, incur a penalty of double the amount of pilotage demandable for the conduct of such ship."

"§ 388. No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot, acting in charge of such ship, within any district where the employment of such pilot is compulsory by law."

2 Pritch., Adm. Dig., App. pp. 104, 110.

SIXTH POINT.—The doctrine of the British admiralty court, that the enjoining by statute of the taking of a pilot, and, in case of refusal, requiring the payment of pilotage dues, amounts to a *compulsion* to take a pilot, and exempts the ship from responsibility while navigated under his charge, has never been followed in this country.

This doctrine is held in *The Maria*, (1 Wm. Rob., 102.)

It seems never to have found favor with Sir William Scott.

The Neptune the Second, 1 Dod., 467.

And the whole doctrine seems to be regarded with great distrust, notwithstanding the policy has been adopted in the statutes.

The courts insisted that the *pilot* must be shown, affirmatively, to have been *wholly* to blame, and that the *onus* of this proof rested upon the party setting up the exemption.

The General de Caen, Swabey, 10.
The Mobile, *Ibid*, 69, 128.
The Diana, 1 Wm. Rob., 135.
The Protector, *Ibid*, 45, 57.
The Massachusetts, *Ibid*, 373.
The Christiana, 7 Moore, Pr. Co. R., 250.
The Schnable, 14, *Ibid*, 241.

And, finally, in a very recent case, and upon a full examination, this doctrine of exemption, by reason of the compulsory employment of a pilot, has been pronounced by Sir Robert Phillimore, a contravention of natural justice and of sound policy.

The Halley, 2 Amd. and Ecc. R., (Law Report series,) p. 3.

See also the Minerva, *Ibid*, 97; the Lion, *Ibid*, 102.

The American cases are of uniform tenor, and the whole subject has been recently reviewed, and the doctrine of continued liability, notwithstanding the pilot regulations of the statutes, firmly established by Mr. Justice Grier in an important case in the Pennsylvania district.

Bussey *vs.* Donaldson, 4 Dall., p. 206.
Williamson *vs.* Price, 4 Martin, (N. S.,) 399.
Yates *vs.* Brown, 8 Pickering, 23.
Dennison *vs.* Seymour, 9 Wend., 1.
Smith *vs.* Condrey, 1 How., 28.
The Lotty, Olcott's Rep., 329.
The Creole, 2 Wall., Jr., 485.
Opinion of Mr. Justice Grier, pp. 511-520.

SEVENTH POINT. The entire incompetency of the legislation of the State of New York to impose such grave consequences upon the commerce of the world, as is sought to be raised here, by construction and implication, is best illustrated by the complete subordination of even the pilotage requirements themselves to the control of Congress, and a comparison of the legislation of Congress on the subject.

St. March 2, 1837, 5 Stat., 153.
St. Aug. 30, 1852, § 9, 10 Stat., 67.
Cisco *vs.* Roberts, 7 Bosw. R., 494.

EIGHTH POINT. There is no error in the computation of damages, and the decree below should be affirmed with costs.

CHAS. E. WHITEHEAD,
WM. M. EVARTS,
Of Counsel for Respondents.